

Nguyen Quoc Viet v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
K-05–203–08 OF 2013
MOHTARUDIN BAKI, AHMADI ASNAWI AND ABDUL RAHMAN
SEBLI JJCA
24 NOVEMBER 2015

Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether trial judge had considered all evidence adduced — Whether trial judge re-evaluated appellant's unsworn statement in the light of evidence adduced by prosecution — Whether breach of s 182(A)(1) of the CPC amounted to serious misdirection — Whether breach warranted appellate intervention — Whether circumstantial evidence relied upon by prosecution strong enough to implicate appellant — Whether conviction safe

The appellant, a Vietnamese national, was one of 12 fellow Vietnamese employees housed in a workers' hostel ('the hostel') in Kedah by their employer. On 8 November 2010, another Vietnamese national, Nguyen Van Thuy ('the deceased'), living in the hostel was found lying dead on a mattress in the hostel. A knife was recovered near the deceased's body. The pathologist who conducted the post-mortem upon the deceased's body concluded that the deceased died due to a stab wound to the heart that was not self-inflicted. The appellant was charged with the murder of the deceased. It was the prosecution's case, that the appellant had been seen talking with the deceased about two hours before the deceased was found fatally wounded. At about 11 pm the same night the police managed to detain the appellant near Klinik Lee Surgery, which was within the township. The appellant's t-shirt had blood stains that had the DNA profile of the deceased. At the end of the prosecution's case the trial judge found that there was no direct evidence to link the appellant with the death of the deceased and that the circumstantial evidence relied upon the prosecution was not strong enough to lead to the only conclusion that the appellant was responsible for the fatal injury suffered by the deceased. As such, the trial judge ruled that the prosecution had failed to prove a prima facie case against the appellant and the latter was acquitted and discharged of the offence. Upon appeal, the Court of Appeal ordered the appellant to enter his defence before the same trial judge. In his unsworn statement from the dock, the appellant denied having anything to do with the injury suffered by the deceased that caused his death. He claimed that although it was true that he had a conversation with the deceased earlier, he had no knowledge as to what had happened to the deceased later as he was in the toilet at the material time. The appellant went on to say that when he had come out of the toilet he had found the deceased sprawled on the floor covered

- A in blood and that he had carried him and placed him on a mattress which was when the deceased's bloodied hand and shoulders had come into contact with his t-shirt. He also explained that he had gone to Klinik Lee Surgery to ask for emergency medical aid, when he was detained by the police. The trial judge found that the defence was a bare denial and an afterthought. Hence the
- B appellant was found guilty and convicted of the offence of murder and sentenced to suffer the death penalty. This was the appellant's appeal against that conviction and sentence on, inter alia, the grounds that the trial judge had erred in law and in fact by his failure to take into account the whole evidence adduced both during the prosecution and the defence stage before arriving at
- C his decision.

Held, allowing the appeal and ordering the appellant to be acquitted and discharged of the offence:

- D (1) It was apparent that the trial judge had not considered all the evidence adduced before him, which included the evidence adduced during the stage of the prosecution's case before coming to the finding that the prosecution had proven its case beyond reasonable doubt against the appellant. This was in clear breach of s 182(A)(1) of the Criminal
- E Procedure Code ('the CPC'), which required the court to consider all the evidence before it at the conclusion of the trial and to decide whether the prosecution had proven its case beyond reasonable doubt. This was the obligatory responsibility of the trial judge. However, in the present case the trial judge had not conducted an exercise to re-evaluate the appellant's
- F unsworn statement in the light of the evidence adduced by the prosecution. The trial judge's decision that the defence of the appellant had failed to cast a reasonable doubt upon the prosecution's case was premised upon a flawed application of the law. The breach of s 182(A)(1) of the CPC verily amounted to a serious misdirection, which warranted
- G appellate intervention (see paras 13–17).
- H (2) Although the appellant's unsworn statement was not evidence and had little weightage, as it was not given under oath, it should be evaluated by the trial judge. In the present case, the appellant's unsworn statement had been amply corroborated by the evidence adduced by the prosecution itself. Going by the evidence of the prosecution witness and fellow hostel in-mate the deceased had been observed talking to the appellant more than two hours before the incident. This witness was not at the scene at the time the deceased suffered the stab wound. As such, the testimony of
- I this prosecution witness did not reveal how the deceased suffered the injury and equally had no nexus with the culpability of the appellant (see paras 18–20).
- (3) There were at least 12 workers staying in the hostel at the material time and at least five of those workers were at the scene at the material time the

deceased was stabbed. However, none of these potential witnesses were called to testify or offered to the defence. There was also no explanation given by the prosecution to account for such failure. In such event, the invocation of the adverse inference rule under s 114(g) of the Evidence Act 1950 to operate adversely against the prosecution, was in order (see para 21).

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- (4) The recovery of the knife, which was the murder weapon, near the deceased's body was of no consequence either to the prosecution or the appellant. No finger print of the deceased was lifted from any part of the knife and the DNA analysis equally did not reveal the presence of the appellant's DNA profile on any part of the said knife (see para 22).

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- (5) The appellant's explanations pertaining to the presence of the deceased's blood stains on his t-shirt and as to why he was near the vicinity of Klinik Lee Surgery were probable and reasonable. In the absence of any evidence to the contrary, the benefit of the doubt ought to be given to the appellant and his denial was not mired in mere denial and afterthought. In the circumstances, the circumstantial evidence relied upon by the prosecution was too weak to fasten the appellant with the commission of the offence. Thus, the conviction of the appellant of the offence was unsafe (see paras 23–25).

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[Bahasa Malaysia summary]

Perayu, seorang warganegara Vietnam, merupakan salah seorang daripada 12 rakan sekerja Vietnamese yang ditempatkan di asrama pekerja ('asrama') di Kedah oleh majikan mereka. Pada 8 November 2010, seorang lagi warganegara Vietnam, Nguyen Van Thuy ('si mati'), yang tinggal di asrama ditemui terbaring mati di atas tilam di dalam asrama. Sebilah pisau ditemui berhampiran badan si mati. Pakar patologi yang menjalankan bedah siasat ke atas badan si mati membuat kesimpulan bahawa si mati meninggal dunia akibat luka tikaman ke jantung yang disengajakan. Perayu dipertuduh membunuh si mati. Kes pendakwaan adalah, bahawa perayu telah dilihat bercakap dengan si mati kira-kira dua jam sebelum si mati ditemui cedera parah. Pada kira-kira pukul 11 malam yang sama polis berjaya menahan perayu berdekatan dengan Klinik Lee Surgery, yang terletak dalam bandar tersebut. T-shirt perayu mempunyai kesan darah yang mempunyai profil DNA si mati. Pada akhir kes pendakwaan, hakim perbicaraan mendapati bahawa tiada bukti secara langsung yang mengaitkan perayu dengan kematian si mati dan keterangan mengikut keadaan yang dipergantungkan oleh pihak pendakwaan tidak cukup kuat untuk membawa kepada satu-satunya kesimpulan bahawa perayu bertanggungjawab untuk kecederaan yang membawa maut yang dialami oleh si mati. Oleh itu, hakim perbicaraan memutuskan bahawa pihak pendakwaan gagal membuktikan kes prima facie terhadap perayu dan yang perayu dilepaskan dan dibebaskan daripada kesalahan tersebut. Selepas rayuan, Mahkamah Rayuan mengarahkan perayu untuk membela diri di hadapan

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- A hakim perbicaraan yang sama. Dalam satu kenyataan tidak bersumpah dari kandung tertuduh, perayu menafikan mempunyai apa-apa kaitan dengan kecederaan yang dialami oleh si mati yang menyebabkan kematiannya. Dia mendakwa bahawa walaupun benar bahawa dia telah berbual dengan si mati sebelumnya, dia tidak mempunyai pengetahuan tentang apa yang kemudiannya berlaku kepada si mati kerana dia berada dalam tandas pada masa material. Perayu seterusnya berkata bahawa apabila dia keluar daripada tandas, dia mendapati si mati bergelimpangan di atas lantai berlumuran darah dan bahawa dia telah mengangkatnya dan meletakkannya di atas tilam di mana tangan dan bahu si mati yang berlumuran darah bersentuhan dengan t-shirtnya. Dia juga menjelaskan bahawa dia pergi ke Klinik Lee Surgery untuk meminta bantuan perubatan kecemasan, apabila dia ditahan oleh pihak polis. Hakim perbicaraan mendapati pembelaan tersebut adalah penafian kosong dan sesuatu yang telah difikirkan kemudian. Oleh itu perayu didapati bersalah dan disabitkan dengan kesalahan membunuh dan dijatuhkan hukuman mati.
- D Ini merupakan rayuan perayu terhadap sabitan dan hukuman tersebut dan antara lain, asas bahawa hakim perbicaraan terkhilaf dalam undang-undang dan fakta melalui kegagalannya untuk mengambil kira keseluruhan keterangan yang dikemukakan pada pihak pendakwaan dan pembelaan sebelum membuat keputusan beliau.

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Diputuskan, membenarkan rayuan dan mengarahkan perayu dibebaskan dan dilepaskan daripada kesalahan:

- (1) Adalah jelas bahawa hakim perbicaraan tidak mempertimbangkan semua keterangan yang dikemukakan di hadapannya, termasuk keterangan yang dikemukakan semasa peringkat kes pendakwaan sebelum membuat dapatan bahawa pihak pendakwaan telah berjaya membuktikan kes melampaui keraguan munasabah terhadap perayu. Ini adalah pelanggaran jelas s 182(A)(1) Kanun Tatacara Jenayah, yang memerlukan mahkamah untuk mempertimbangkan semua keterangan di hadapannya pada akhir perbicaraan dan untuk memutuskan sama ada pihak pendakwaan berjaya membuktikan kes mereka melampaui keraguan munasabah. Ini merupakan tanggungjawab wajib hakim perbicaraan. Walau bagaimanapun, dalam kes ini hakim perbicaraan telah tidak menjalankan latihan untuk menilai semula kenyataan tidak bersumpah perayu selepas mengetahui keterangan yang dikemukakan oleh pihak pendakwaan. Keputusan hakim perbicaraan bahawa pembelaan perayu telah gagal untuk menimbulkan keraguan yang munasabah ke atas kes pendakwaan berpremiskan permohonan tersebut tidak sempurna dari segi undang-undang. Pelanggaran s 182(A)(1) Kanun Tatacara Jenayah sesungguhnya merupakan satu salah arahan serius, yang mewajarkan campur tangan rayuan (lihat perenggan 13–17).
- (2) Walaupun kenyataan tidak bersumpah perayu bukanlah keterangan dan mempunyai pemberatan yang sedikit, kenyataan tersebut sepatutnya

dinilai oleh hakim perbicaraan. Dalam kes ini, kenyataan tidak bersumpah perayu telah menyokong secukupnya keterangan yang dikemukakan oleh pihak pendakwaan itu sendiri. Mengikut keterangan saksi pendakwaan dan rakan-rakan seasrama, si mati dilihat bercakap kepada perayu lebih daripada dua jam sebelum insiden tersebut. Saksi ini tidak berada di tempat kejadian semasa si mati mengalami luka tikaman. Oleh itu, keterangan saksi pendakwaan ini tidak mendedahkan bagaimana si mati mengalami kecederaan dan sama-sama tidak mempunyai kaitan dengan kebersalahan perayu (lihat perenggan 18–20).

- (3) Terdapat sekurang-kurangnya 12 pekerja yang tinggal di asrama pada masa tersebut dan sekurang-kurangnya lima orang pekerja yang berada di tempat kejadian pada masa si mati ditikam. Walau bagaimanapun, tiada saksi-saksi yang berpotensi dipanggil memberi keterangan atau ditawarkan kepada pihak pembelaan. Tiada penjelasan yang diberikan oleh pihak pendakwaan untuk mengambil kira kegagalan tersebut. Dalam keadaan demikian, penggunaan prinsip anggapan berlawanan di bawah s 114 (g) Akta Keterangan 1950 untuk digunakan sebaliknya terhadap pendakwaan, adalah dibenarkan (lihat perenggan 21).
- (4) Penemuan pisau, yang merupakan senjata pembunuhan, dekat badan si mati adalah tidak membawa akibat sama ada kepada pihak pendakwaan atau perayu. Tiada cap jari si mati yang diambil daripada mana-mana bahagian pisau dan analisis DNA sama-sama tidak mendedahkan kehadiran profil DNA perayu di mana-mana bahagian pisau tersebut (lihat perenggan 22).
- (5) Penjelasan perayu berhubung kehadiran kesan darah si mati pada t-shirtnya dan mengapa dia berada di sekitar kawasan Klinik Lee Surgery adalah berkemungkinan dan munasabah. Jika tiada keterangan yang bercanggahan, manfaat keraguan itu patut diberikan kepada perayu dan penafiannya bukanlah terang-kum dalam penafian semata-mata dan sesuatu yang telah difikirkan kemudian. Dalam keadaan ini, keterangan mengikut keadaan yang dipercayai oleh pihak pendakwaan adalah terlalu lemah untuk mengikat perayu dengan pelakuan kesalahan tersebut. Oleh itu, sabitan perayu atas kesalahan tersebut tidak kekal (lihat perenggan 23–25).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ

- A 293; [2015] 2 CLJ 145, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Lee Boon Gan (F) v Regina [1954] 1 MLJ 103 (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
PP v Sanassi [1970] 2 MLJ 198 (refd)
- B *Wong Heng Fatt v PP* [1959] 1 MLJ 20; [1958] 1 LNS 96 (refd)

Legislation referred to

Criminal Procedure Code s 182A(1)

Evidence Act 1950 ss 32, 114(g)

- C Penal Code ss 300, 302

Appeal from: Criminal Trial No 45B-36-09 of 2011 (High Court, Alor Star)

Naran Singh (Naran Singh & Co) for the appellant.

- D *Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Ahmadi Asnawi JCA:

- E [1] In the court below, the appellant was charged as follows:
- Bahawa kamu pada 8 November 2010, pada jam lebih kurang 8.50 malam, bertempat di asrama pekerja, Tingkat 1, No. 156-B, Pekan Jitra, di dalam Daerah Kubang Pasu, di dalam Negeri Kedah Darulaman, telah melakukan pembunuhan ke atas Nguyen Van Thuy (warganegara Vietnam, No Passport B4318169). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
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- G [2] At the end of the prosecution's case the learned judge ordered the acquittal and discharged of the appellant on account of the prosecution's failure to prove a prima facie case against the appellant upon the charge proffered. However, upon appeal, the Court of Appeal ordered the appellant to enter his defence before the same learned judge.
- H [3] The appellant gave an unsworn statement from the dock in his defence. At the end of the defence, the appellant was found guilty of the offence and was convicted of the same. He was sentenced to suffer the death penalty.
- I [4] The appeal before us was in respect of the said conviction and sentence. After due consideration of the issues raised, we allowed the appeal. The appellant was henceforth acquitted and discharged of the offence. We now give our grounds.

THE CASE FOR THE PROSECUTION

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[5] The narratives are as follows:

- (a) the appellant, a Vietnamese national, was an employee of Sykt Double Site Sdn Bhd and was housed in a workers hostel as indicated in the charge together with 12 other fellow Vietnamese employees. The deceased Nguyen Van Thuy, also a Vietnamese national, was also staying/living in the said hostel; B
- (b) on 8 November 2010, at about 6.30pm, SP5 (Nguyen Dan Bac, also a Vietnamese national) a fellow housemate of the deceased and the appellant, arrived at the hostel. He was back from work. He saw both the deceased and respondent having conversation; C
- (c) at about 9.30pm, SP6 (Poo Wai Seong), the manager of Sykt Double Site Sdn Bhd, received a telephone call from his employee, one Firdaus, that a fight had occurred at the said hostel. He proceeded to the hostel to investigate; D
- (d) on arrival at the said hostel, he saw one of his employee, the deceased, lying dead on a mattress. The deceased's body was covered with a piece of cloth. There was also a knife near the deceased's body; E
- (e) at about 11pm the same night, SP8 (Supt Ibrahim Mohamed Yusof), managed to detain the appellant near Klinik Lee Surgery within the township area. The appellant then appeared to be moving in such a hurry; F
- (f) the appellant was later handed to the investigating officer (IO) of the case, SP11 (ASP Anuar Bakri bin Abdul Salam). He proceeded to seize the t-shirt and trousers then worn by the appellant. According the SP11, he seized the items because there were blood stains on the collar of the said t-shirt worn by the appellant; and G
- (g) the forensic pathologist, SP10 (Dr Mohd Suhani Mohd Noor), who conducted the post mortem upon the deceased's body concluded that the deceased died due to stab wound to the heart. The deceased suffered no other injuries. SP10 also ruled out the possibility that the said fatal stab wound was self inflicted or accidental. H

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

I

[6] The learned judge found that there was no direct evidence to link the appellant with the death of the deceased. Equally the learned judge found that the circumstantial evidence relied upon by the prosecution to link the appellant with the commission of the offence ie the appellant was seen talking with the

- A deceased about two hours before the deceased was found fatally wounded; that there were blood stains on the t-shirt worn by the appellant bearing the DNA profile of the deceased; and that the deceased had fled the scene and was arrested about two hours later near Klinik Lee Surgery, can hardly be said to be strong enough to lead to the only conclusion that the fatal injury suffered by
- B the deceased was occasioned singularly by the act of the deceased. The learned judge ruled that the prosecution had failed to prove a prima facie case against the appellant upon the charge as proffered. The appellant was thus ordered to be acquitted and discharged of the offence.

C THE CASE FOR THE DEFENCE

- [7] Aggrieved by the said decision, the honourable public prosecutor lodged an appeal to the Court of Appeal. On 14 March 2013, the Court of
- D Appeal allowed the said appeal and ordered the appellant to enter his defence before the same learned judge.

[8] The appellant gave an unsworn statement from the dock in his defence and posited, at p 4, *rekod rayuan tambahan* ('RRT'):

- E (a) he was at the said hostel at about 8.50pm on the day of the incident together with the deceased, SP5 and 12 other fellow Vietnamese workers;
- F (b) he spoke for a while with the deceased in the presence of SP5, after which he left for the toilet to answer the call of nature;
- G (c) while in the toilet he heard noises and screams as though there were people fighting (*bergaduh*) outside;
- (d) he left the toilet and had a shock when he saw the deceased sprawling on the floor, covered in blood. He approached the deceased and found that the deceased was seriously injured. He carried the deceased and placed the deceased on a red coloured mattress as shown in photographs No 23 and 24 at p 141 of the *rekod rayuan* (RR);
- H (e) one of the bloodied hand and shoulders of the deceased came into contact with the shirt he was wearing as the said hand was upon his shoulders when he carried and placed the deceased on the mattress;
- I (f) after placing the deceased on the said mattress, he hurried to look for emergency aid to save the deceased as there appeared to be no one in the said hostel;
- (g) he proceeded on foot to a clinic within the vicinity to seek emergency aid. However he got arrested by the police near the clinic; and

- (h) the appellant reiterated that the deceased was never his enemy, had never crossed-path or had any misunderstanding with the deceased and had harboured no motive to murder the deceased. A

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE DEFENCE CASE B

[9] The learned judge found that the defence was a bare denial and an afterthought on account of the failure to raise the issues adverted to in his defence in the cross-examination of the prosecution witnesses. The defence had failed to raise a reasonable doubt upon the prosecution case. Hence the appellant was found guilty and convicted of the offence of murder under s 302 of the Penal Code ('the PC') and accordingly sentenced to suffer the death penalty. C

THE APPEAL BEFORE US D

[10] The appellant posited two grounds of appeal:

- (i) the learned judge erred in law and in fact when he failed to take into account and consider the whole evidence adduced, both during the prosecution and the defence stage before arriving at his decision; and E
- (ii) the learned judge erred in law and in fact when he relied solely upon the Court of Appeal's decision calling the appellant to enter his defence as evidence that the prosecution has proven that the appellant had inflicted the injury upon the deceased that caused his death even though it is not clear under which limb of s 300 of the PC that the act that caused the said death was occasioned. F

[11] As regards to the first ground, learned counsel submitted that the failure by the learned judge to do so had occasioned a breach of s 182A(1) of the Criminal Procedure Code ('the CPC') which is serious enough to amount to a misdirection. He relied upon *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 to fortify his contention. In so far as the second ground is concerned, learned counsel contended that there is no evidence adduced to link the appellant with the commission of the offence. G H

OUR FINDINGS

[12] We proposed to deal with the two grounds together as they appeared to be interwoven. I

[13] The core of the learned judge's decision in convicting the appellant appeared at paras 29–31 of his grounds of judgment (at p 47–49 of RRT). We

A reproduced the same below for purposes of clarity:

B [29] Di dalam kes ini pembelaan telah diarahkan oleh Mahkamah Rayuan setelah membenarkan rayuan Pendakwa Raya. Berdasarkan prinsip-prinsip undang-undang yang menghendaki mahkamah memberi pertimbangan maksima ke atas keterangan pihak pendakwaan, saya yakin Mahkamah Rayuan telah membuat pertimbangan sedemikian dan telah berpuashati bahawa keterangan pihak pendakwa telah membuktikan bahawa OKT telah mengenakan kecederaan badan ke atas si mati yang menyebabkan kematiannya dan perbuatan OKT mengenakan kecederaan badan ke atas si mati tersebut terjatuh di bawah salah satu keadaan di bawah s 300 Kanun Keseksaan; walaupun tidak jelas di dalam kes ini yang mana satukah keadaan tersebut.

C [30] Dengan demikian pembelaan OKT sekarang perlulah menimbulkan keraguan yang munasabah ke atas kes prima facie tersebut. Berdasarkan pembelaan OKT melalui penyataannya, OKT sama sekali menafikan mengenakan kecederaan tubuh badan ke atas si mati. Pembelaan ini jelas satu penafian yang tidak disokong oleh keterangan lain. Pembelaan ini juga satu pembelaan yang difikirkan kemudian kerana pembelaan yang ditimbulkan ini tidak pernah ditimbulkan semasa pemeriksaan balas ke atas saksi-saksi pendakwaan.

D [31] Di dalam keadaan yang sedemikian saya mendapati pembelaan OKT telah gagal menimbulkan keraguan yang munasabah ke atas kes pendakwaan. OKT didapati bersalah dan disabitkan dengan kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

F [14] The paragraphs reproduced above were the only reference made by the learned judge in respect of the appellant's defence in his entire judgment. It is apparent that the learned judge did not consider all the evidence adduced before him which includes the evidence adduced during the stage of the prosecution's case before coming to the finding that the prosecution has proven its case beyond reasonable doubt against the appellant, in clear breach of the provision of s 182A(1) of the CPC which requires that the court shall consider all the evidence before it at the conclusion of the trial and shall decide whether the prosecution has proved its case beyond reasonable doubt. This is the obligatory responsibility of the trial judge.

H [15] The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, explained what can be said to have been proved beyond reasonable doubt in the following terms:

I Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt, the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. *Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence.* However, where the accused remains silent there

will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt. (Emphasis added.)

A

[16] The learned judge clearly conducted no exercise to re-evaluate the appellant's unsworn statement in the light of the evidence adduced by the prosecution in breach of s 182A(1) of the CPC and as further propounded by the decision in *Balachandran* cited above. The learned judge's decision that the defence of the appellant has failed to cast a reasonable doubt upon the prosecution's case is apparently premised upon a flawed application of the law.

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[17] In the event we were with learned counsel's submissions that the failure of the learned judge to consider all the evidence adduced before him before deciding that the prosecution has proved its case beyond reasonable doubt in breach of s 182A(1) of the CPC, verily amounted to a serious misdirection which warrants our intervention.

D

[18] The appellant gave an unsworn statement in his defence. An unsworn statement is not evidence as it is not given under oath and the accused cannot be cross-examined on his unsworn statement – see *Public Prosecutor v Sanassi* [1970] 2 MLJ 198; *Wong Heng Fatt v PP* [1959] 1 MLJ 20; [1958] 1 LNS 96; *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104. Such a statement carries little weight as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge – see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145. However, for what it is worth the unsworn statement must be evaluated by the trial judge although it may not be, strictly speaking, evidence and conclude whether though of little weightage, it has not or it has nevertheless created a reasonable doubt upon the prosecution's case, regard being had to the surrounding circumstances and other available evidence that may corroborate the unsworn statement – see *Lee Boon Gan (F) v Regina* [1954] 1 MLJ 103.

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[19] The appellant, in his unsworn statement, denied having anything to do with the injury suffered by deceased that eventually caused his death. He claimed he has no knowledge as to what had happened to the deceased as he was in the toilet at the material time.

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[20] It appeared to us that the appellant's statement was amply corroborated by the evidence adduced by the prosecution itself. SP5 saw the appellant talking with the deceased at about 6.30pm on the day of the incident. That was more than two hours before the incident, which according to the prosecution took place at about 8.50pm SP5 added that he did not know what took place

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- A thereafter as he had gone elsewhere to mend his wardrobe. In the circumstances, we could not see how SP5's testimony could be taken to link the appellant with the commission of the offence. Going by his testimony, SP5 was not even at the scene at the time the deceased suffered the said stab wound. SP5's testimony did not reveal how the deceased suffered the injury and equally
- B has no nexus with the culpability of the appellant.

- C [21] SP6 testified that there were at least 12 workers staying in the hostel and SP11, the IO of the case, said that in the course of his investigation, he was informed that there were at least five people at the scene at the material time the deceased was stabbed. He took formal statements from these five persons. However, none of these potential witnesses were called to testify or offered to the defence. There was no explanation given by the prosecution to account for such failure. Their statements were neither tendered in court under s 32 of the
- D Evidence Act 1950, in the event that they were no longer around and could not be traced. In such event, the invocation of the adverse inference rule under s 114(g) of the same Act to operate adversely against the prosecution, is in order.

- E [22] The recovery of the knife, exh P11B, near the deceased's body is of no consequence either to the prosecution nor the appellant. In all probability the said knife was the weapon used to cause the stab wound upon the deceased as the DNA profile of the deceased was developed from the blood stains found on the knife – see chemist report, exh P7 at p 168, RR. However there is no
- F evidence to link the knife with the appellant or that the appellant had used the knife to cause the said injury upon the deceased. No finger print of the deceased was lifted from any part of the said knife and the DNA analysis equally did not reveal the presence of the appellant's DNA profile on any part of the said knife. In such event we could only conclude that in all probability someone had used
- G the said knife to stab the deceased but that someone cannot be fastened to the appellant for want of evidence.

- H [23] The appellant has given an explanation pertaining to the presence of the deceased's blood stains on his t-shirt. He also explained why he was at or near the vicinity of Klinik Lee Surgery – see paras 8.5, 8.6 and 8.7. We opined his explanations on both counts to be probable and reasonable. He was not injured and hence has no reason to go to the clinic. It lend credence to his explanation that he went to the clinic to seek treatment for the deceased. In the absence of any evidence to the contrary, the benefit of the doubt ought to be
- I given to the appellant. His defence is not mired in mere denial and afterthought.

[24] We were also of the view that the circumstantial evidence relied by the prosecution is too weak to fastened the appellant with the commission of the

offence. At the highest the only link to establish the commission of the offence with the appellant is the presence of blood stains belonging to the deceased on the t-shirt worn by the appellant at the material time. However, this alone is insufficient to sustain a finding that the appellant did commit the offence. Additionally the appellant has given an explanation to account for the same which we opined to be probable and reasonable.

[25] For all the reasons enumerated above we found the conviction of the appellant of the offence to be unsafe. We therefore unanimously allowed the appeal. We set aside the order of conviction and sentence of the High Court. The appellant is ordered to be acquitted and discharged of the offence.

Appeal allowed and appellant ordered to be acquitted and discharged of the offence.

Reported by Kohila Nesan

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